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JOSEPH F. SPANIOLO,  
CLERK

In The  
Supreme Court of the United States

October Term, 1986

BRONSON C. LA FOLLETTE,  
Attorney General of Wisconsin,

*Petitioner,*

*v.*

BURLINGTON NORTHERN RAILROAD COMPANY  
and BURLINGTON NORTHERN DOCK  
CORPORATION,

*Respondents.*

On Petition for Writ of Certiorari to  
the Supreme Court of the State of Wisconsin

BRIEF OF RESPONDENTS IN OPPOSITION

ROBERT A. SCHNUR  
*Counsel of Record*

MICHAEL, BEST & FRIEDRICH  
250 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202  
(414) 271-6560

*Attorneys for Respondents*  
*BURLINGTON NORTHERN RAILROAD*  
*COMPANY AND BURLINGTON*  
*NORTHERN DOCK CORPORATION*



**QUESTION PRESENTED FOR REVIEW**

Does a state tax on iron ore which expressly exempts ore mined within the taxing state (and which therefore discriminates on its face against ore mined in other states) violate the Commerce Clause of the United States Constitution?

## PARTIES

The parties to the proceedings below were the Petitioner, Bronson C. La Follette, Attorney General of Wisconsin and the Respondents, Burlington Northern Railroad Company, a Delaware corporation, and Burlington Northern Dock Corporation, a Delaware corporation. The lower court caption also included Burlington Northern, Inc., which is the prior name of the present Burlington Northern Railroad Company, and which is now a newly organized holding company. The new holding company was not a tax payer during the years at issue and is not a party to this case.

In compliance with Supreme Court Rule 28.1, Burlington Northern Railroad company and Burlington Northern Dock Corporation have the relationships described below with respect to other companies held by the Burlington Northern, Inc. holding company.

### BURLINGTON NORTHERN, INC.

#### Subsidiaries and Affiliates

BN Financial Services Inc.

BN Geothermal Inc.

BN Leasing Inc.

Burlington Northern Foundation

Burlington Northern International  
Services Inc.

Burlington Northern Trading  
Company Inc.

Burlington Northern Motor  
Carriers Inc.

BNMC Leasing Inc.

Burlington Northern Overseas

Finance Company N.V.

Burlington Northern Railroad  
Company (See Page iv)

Colt Intermodal Inc.

Glacier Park Company

Dreyer Bros., Inc.  
Glacier Arizona Company  
Glacier Park Boulder Company  
Glacier Park Denver Company  
Glacier Park Orillia Company I  
Glacier Park Riverpoint  
Company  
Heritage Glacier Park Company  
Kalispell Glacier Park Company  
Tennessee Glacier Park Company

Glacier Park Liquidating Company

Meridian Minerals Company

Granite Falls Rock  
Meridian Aggregates Company  
Saxony Corporation

M-R Holdings (See Page v)

National Exchange, Inc. (90%)

National Exchange  
Satellite, Inc.

New Mexico and Arizona Land  
Company (50%)

NZ Development Corporation  
NZ Properties, Inc.

Plum Creek Timber Company, Inc.

Plum Creek Foreign Sales  
Corporation

Research Applications Inc.

The El Paso Company (See Page v)

Burlington Northern Railroad Company

The Belt Railway Company of Chicago (8.33%)  
 Burlington Northern Dock Corporation  
 Burlington Northern (Manitoba) Limited  
 Burlington Northern Railroad Properties Inc.  
 Camas Prairie Railroad Company (50%)  
 Clarkland Royalty, Inc.  
 Davenport, Rock Island and North Western  
 Railway Company (50%)  
 The Denver Union Terminal Railway  
 Company (33.33%)  
 Houston Belt & Terminal Railway Company (12.5%)  
 Iowa Transfer Railway Company (25%)  
 Kansas City Terminal Railway Company (16.67%)  
 Keokuk Union Depot Company (40%)  
 The Lake Superior Terminal and Transfer  
 Railway Company (66.67%)  
 Longview Switching Company (33.33%)  
 The Minnesota Transfer Railway Company (33.33%)  
 Paducah & Illinois Railroad Company (33.33%)  
 Portland Terminal Railroad Company (40%)  
 The Saint Paul Union Depot Company (40.2%)  
 Terminal Railroad Association of St. Louis (12.5%)  
 Trailer Train Company (9.76%)  
 Western Fruit Express Company  
 The Wichita Union Terminal Railway  
 Company (33.33%)  
 Winona Bridge Railway Company (66.67%)  
 Northern Radio Ltd.

El Paso Mojave Pipeline Co.  
El Paso Natural Gas Building company  
El Paso Natural Gas Clearinghouse Company  
El Paso Production Company  
Meridian Oil Holding Inc.  
Meridian Oil Inc.  
Butte Pipe Line Company (10%)  
Meridian Oil Pipeline Company  
Meridian Oil Trading Inc.  
Northern Rockies Pipe Line Co.  
Portal Pipe Line Company (50%)  
Meridian Oil Production Inc.  
EPX Company  
Meridian Oil Services Inc.

M-R Holdings Inc.

M-R Holdings Acquisition Company

M-R Holdings Inc. No. 1 (Through No. 7)

Southland Royalty Company  
 Southland Gathering Company  
 Southland Pipeline Company  
 SRC Production Company  
 SRC Realty Company

The El Paso Company

El Paso Natural Gas Company (98.49%)  
 BEM Holding Corporation  
 El Paso Del Peru Company  
 El Paso Development Company  
 Ex-Mission Ranches, Inc.  
 Windjammer, Inc.  
 El Paso Gas Marketing Co.  
 El Paso Hydrocarbons Company  
 El Paso Frontera Corporation  
 El Paso Gas Transportation Company  
 El Paso Hydrocarbons Gas Processing Company  
 El Paso Hydrocarbons NGL Company  
 El Paso Hydrocarbons Pipeline Company  
 El Paso Hydrocarbons Service Company  
 El Paso Hydrocarbons Transportation Company  
 El Paso Storage Company  
 West Lake Natural Gasoline Co.  
 Odessa Natural Gasoline Co.  
 Odessa Pipeline Company  
 Pecos Company  
 Trebol Drilling Company



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BRIEF OF RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The Respondents do not take issue with the Petitioner's Statement of the Case except in one respect.

Petitioner states that the taconite pellets which are the subject of the tax at issue are "stored at the docks until they can be loaded onto barges for shipment...."

Petition, p. 9. This is only partially accurate. The record indicates that some of the pellets were in fact transported by conveyors directly from Burlington Northern's rail cars to waiting barges, where they were immediately shipped to non-Wisconsin destinations. See Memorandum Opinion of the Douglas County Circuit Court, reprinted at Petitioner's Appendix, Vol. II, pp. 159, 167-168.

Respondents submit in any event that this fact is irrelevant to the Question Presented for Review.

## REASONS FOR DENYING THE WRIT

### I. THIS CASE LACKS ANY "SPECIAL AND IMPORTANT" REASON FOR GRANTING CERTIORARI

Rule 17.1 of this Court provides that a review on writ of certiorari is not a matter of right and will be granted "only when there are special and important reasons therefor." No such reasons exist in this case.

#### A. The Case Has Little If Any Practical Significance Beyond The Determination Of Respondents' Tax Liability For Past Years.

The trial court in this proceeding found that the exemption for ore mine within the State of Wisconsin which was contained in Wis. Stat. §70.40 as in effect for the years 1977 through 1980, discriminated against non-Wisconsin ore. See Memorandum Opinion of the Douglas County Circuit Court, reprinted at Petitioner's Appendix, Vol. II, pp. 159, 188-189. The finding was upheld by the Wis. Stat §70.40 Wisconsin Supreme Court, which concluded that the Wisc. Stat. §70.40 was thereby invalid under the "discrimination" prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1971). See Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. I, pp. 101, 123-124. During the pendency of the appeal to the Wisconsin Supreme Court, the Wisconsin legislature eliminated the offending exemption

on a prospective basis. 1985 Wis. Act 29 §§1216b & 1216d, reprinted at Petitioner's Appendix, Vol. II, p. 205.

At this point, therefore, the instant case has no practical significance beyond the determination of Respondents' Wisconsin tax liability through December 31, 1986. No other taxpayers in Wisconsin are affected. No future years of *these* taxpayers are affected. No other states are affected.<sup>1</sup> This Court, therefore, is being asked to intervene in what is now only a monetary dispute, arising out of a narrow question that is, for the future, moot even as between the parties. Under these circumstances, it is respectfully submitted that this Court should deny the Petition.

**B. Nor Does The Case Involve Any Conflicts With Other Court Decisions.**

Inasmuch as this case involves such a narrow legal issue and since it carries with it such a narrow practical impact, it would be expected that the Petitioner would at least point to some conflict between the decision appealed from and some other state or federal court decision, so as to fall within the guidelines of Supreme Court Rule 17.1(b) or (c). No such conflict is presented. Instead, the Petitioner argues only (i) that the tax "scheme" was so important to the State of Wisconsin and the City of Superior that it should be "encouraged" and not "invalidated" (Petition, pp. 14-16), (ii) that the Wisconsin Supreme Court allegedly overlooked and misconstrued some facts in the record (Petition, pp. 16-25) and (iii) that the State Supreme Court allegedly went beyond existing case law in concluding that a discriminatory purpose was sufficient to invalidate a tax (Petition, pp. 25-29).<sup>2</sup> None of these contentions, even if

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<sup>1</sup> Petitioner has not identified a comparable statutory pattern in any other jurisdiction than Wisconsin.

<sup>2</sup> Significantly, even on this latter point, the Petitioner's argument is only that no other court has invalidated a tax based solely on a discriminatory legislative purpose and Petitioner

(Footnote continued on the following page)

true, present a reason as to why this Court should grant the Petition.

## II. IN ANY EVENT, THE DECISION OF THE WISCONSIN SUPREME COURT WAS CORRECT

The true basis of the Petition is, therefore, that the Wisconsin Supreme Court was wrong and two arguments are advanced in support of that conclusion. The Respondents respectfully suggest that, even if the arguments are correct, this Court should deny the Petition because of the limited significance of the case as discussed above. If this Court nevertheless chooses to review the merits of the case, the Petition should still be denied because the decision of the Wisconsin Supreme Court was in fact correct in every respect.

### A. The Wisconsin Supreme Court Did Not Overlook Or Misconstrue Facts In The Record.

The Petitioner first argues that the Wisconsin

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#### 2 (Continued)

points to no case, state or federal, which holds that a discriminatory purpose is *not* fatal. Thus, even if Petitioner's contentions were correct, they disclose no judicial conflict such as envisioned by Supreme Court Rule 17.1. Furthermore, this argument also ignores the statement of the Wisconsin Supreme Court that its analysis also disclosed a "discriminatory effect on interstate commerce" (emphasis supplied). See Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix Vol. I, p. 124. The Petitioner argued in its Motion for Reconsideration to the Wisconsin Supreme Court that the Court was wrong on this point, see Defendant-Respondent's Motion for Reconsideration, reprinted at Petitioner's Appendix, Vol. II, pp. 153-154, but the Court denied such Motion, see Order of Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. II, p. 155. The Petitioner is making the same point in its Petition herein but that is a factual matter which is hardly resolvable this Court.

Supreme Court overlooked or misconstrued facts appearing in the record when it concluded that the Wisconsin tax discriminated against non-Wisconsin ore. The Petitioner correctly points out, thus, that no Wisconsin mined ore was actually shipped over Wisconsin ore docks during the years in question, and concludes from this fact that there was in fact no discrimination against interstate commerce within the meaning of the Commerce Clause.

The flaw in this argument is, however, that it assumes that a discriminatory effect can be demonstrated in this case *only* by showing that there was an actual shipment of Wisconsin ore over a Wisconsin dock during the years in question. There are several reasons why this assumption is inaccurate.

As an initial matter, it is apparent that interpreting the "discrimination" prong of *Complete Auto Transit* in this manner would mean that the constitutionality of the Wisconsin law during the years at issue would depend upon whether some Wisconsin competitor chose to ship its ore by rail or boat during those years. As the Supreme Court of Wisconsin stated, however, the applicability of the Commerce Clause cannot be "dependent upon the vicissitudes of business decisions."<sup>3</sup> The Petitioner seeks to

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<sup>3</sup> Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. I, p. 131. Such a test would raise numerous issues, some of them bordering on the absurd. Would, then, the constitutionality or unconstitutionality of the law be determined on an annual basis, so that the tax was invalid in a year in which some (any?) Wisconsin ore *was* shipped over the docks, while remaining valid in a year in which no such shipment took place? Or, conversely, would the shipment of such ore at *any* time invalidate the statute? And, if the latter rule were adopted, would the invalidation then be retroactive to the enactment of the tax or would it be prospective only? Surely, it cannot be the meaning of *Complete Auto Transit* and the other cited cases that serious constitutional issues such as herein involved are built upon such a transitory foundation.



meet this argument by pointing out that the exemption for Wisconsin ore was eliminated by the legislature in 1985 but there is no precedent which holds that an unconstitutional provision can be cured retroactively by a later statute, particularly one which is by its terms prospective in application. Moreover, the Petitioner's argument overlooks the potential impact of such a holding on other discriminatory statutes in Wisconsin and elsewhere and also ignores the possibility that, faced with a judicial decision that the exemption was permissible, the Wisconsin legislature could reinstate the discriminatory provision at any time. Therefore, the true meaning of the "discrimination" prong must be that a discriminatory effect, at least in some circumstances, can be *assumed* from the face of a patently discriminatory statute, and it is on this principle that the Wisconsin Supreme Court must have based its conclusions herein.<sup>4</sup> Therefore, unless this Court were to find that such an assumption is never justified, it should defer to the conclusions reached in the courts below.

Moreover, the cases cited by the Petitioner do not support his argument. In neither *Complete Auto Transit* nor *Washington Rev. Dept. v. Stevedoring Ass'n*, 435 U.S. 734 (1978) was the tax in question discriminatory in any manner and, thus, those cases have no bearing on the question of what must be shown to prove an unconstitutional discrimination. Further, in the cited cases which do involve discriminatory statutes, the Petitioner's out-of-context quotations do not accurately reflect the actual holdings of those cases. For example, in *Maryland v. Louisiana*, 451 U.S. 729 (1981), the Court noted that the tax was discrim-

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<sup>4</sup> For example, the Wisconsin Supreme Court could well have concluded that the patently discriminatory tax at issue would have had some impact on business decisions made during the years the exemption was in place, such as decisions with respect to investments in Wisconsin versus Minnesota mines.



inatory "on its face"<sup>5</sup>, which had the "obvious economic effect" of encouraging local investors;<sup>6</sup> this by itself was sufficient to invalidate the tax because, while it "may be true that further hearings would be required to provide a precise determination of the extent of the discrimination"<sup>7</sup>, this was an "insufficient reason"<sup>8</sup> for "not now declaring the tax unconstitutional."<sup>9</sup> And see similarly *Boston Stock Exchange v. State Tax Comm'n.* 429 U.S. 318, 334n (1977), holding that a tax penalty for trading on an out-of-state stock market would be *per se* invalid whether or not the penalty was shown to have actually dissuaded any particular investors from making out-of-state trades.

In summary, then, the Supreme Court of Wisconsin concluded that the statute in question had a discriminatory effect whether or not, in any particular year, any Wisconsin ore was actually shipped over a Wisconsin dock. There is nothing in the record nor in the prior decisions of this Court which requires that that conclusion be overturned.<sup>10</sup>

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<sup>5</sup> 451 U.S. at 756.

<sup>6</sup> *Id.* at 757.

<sup>7</sup> *Id.* at 759.

<sup>8</sup> *Id.* at 760.

<sup>9</sup> *Id.*

<sup>10</sup> The Petitioner also argues that it is somehow relevant to this case that, during the years in question, the only producer of Wisconsin ore (Jackson County Iron Company) had a common parent corporation (Inland Steel Corporation) with one of the Minnesota mining companies (Butler Taconite Company). This argument too, however, would make a constitutional conclusion depend upon the "vicissitude of business decisions." Thus, if this argument were accepted, would the Wisconsin tax then become invalid if and when Inland Steel relinquished all or part of its interest in Butler Taconite or in Jackson County Iron? What

(Footnote continued on the following page)

**B. The Wisconsin Supreme Court did not improperly consider the legislative purpose behind the tax at issue.**

The Petitioner's final argument is that the Wisconsin Supreme Court erred in relying on the discriminatory purpose of the legislature in enacting the tax. Here too, however, there are several fatal flaws in this argument.

For one thing, the Court, in invalidating the Wisconsin tax, did *not* rely solely on the legislature's purpose in enacting the tax. Rather, it merely considered that purpose as a factor in reaching its conclusion that the tax, being discriminatory on its face, was invalid. Opinion of the Wisconsin Supreme Court, reprinted at Petitioner's Appendix, Vol. I, pp. 124-126, 130.

Moreover, this Court noted in the *Complete Auto Transit* case that a tax which is "tailored" to reach only interstate commerce must receive particularly careful scrutiny by the courts. 430 U.S. at 288 n.15. In this case it is undisputed that the State of Wisconsin intended to tax only ore moving in interstate commerce and that it fully recognized and intended that the tax would in fact be paid only by one taxpayer (that is, Burlington Northern). Such a law is exactly the type of "tailored" tax which requires the close scrutiny of the courts and the Wisconsin Supreme Court acted properly in determining that this legislative purpose was a relevant factor for it to consider.

Finally, there is significant precedential support for the conclusion that a legislative intent to favor local commerce is sufficient in itself to invalidate a patently discriminatory statute. For example, in *Bacchus Imports*,

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10 (Continued)

would happen to the law if other (independent) producers began to produce Wisconsin taconite? And what about non-Wisconsin producers who do *not* have Wisconsin mines or affiliates? Here again, constitutional principles are not built upon such transitory foundations.

*Ltd. v. Dias*, 408 U.S. 263 (1984), this court held that state tax legislation may be discriminatory on the basis of either purpose or effect; although the Petitioner argues that the Court did not really mean this (since the *Bacchus* record demonstrated a minor direct competitive effect), it remains that this Court did in fact so hold. *See also Armco, Inc. v. Hardesty*, 467 U.S. 638. The Petitioner attempts to distinguish *Armco* by arguing that, in that case, the Court found an "obvious" burden: in fact, however, the Court in *Armco* found no actual burden on the taxpayer other than the "obvious burden" created by a statute that "on its face" discriminates against interstate commerce. *Id.* at 644. That was sufficient to invalidate the tax and a similar conclusion is required in the instant case.

## CONCLUSION

For the above reasons, the Court is respectfully requested to deny the Petition for Writ of Certiorari.

Respectfully submitted,  
this 11th day of  
December, 1986

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ROBERT A. SCHNUR  
*Counsel of Record*

MICHAEL, BEST & FRIEDRICH  
250 East Wisconsin Avenue  
Milwaukee, Wisconsin 53202  
(414) 271-6560

*Attorneys for Respondents*

